IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 10TH JANUARY 2007 / 20TH PAUSHA 1928

WP(C).No. 1064 of 2007(B)

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AGAINST THE ORDER IN IA.3144/06 IN
OS.80/2006 of ADDL.M.C.,KOTTAYAM

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PETITIONERS:

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1. K.O. DANIEL, KUNNEL HOUSE,
S.N.PURAM P.O., KOTHALA KARA,
KOOROPPADA VILLAGE.

2. ELIAMMA DANIEL, W/O.K.O.DANIEL,
KUNNEL HOUSE, S.N.PURAM P.O.,
KOTHALA KARA, KOOROPPADA VILLAGE.

BY ADV. SRI.K.GOPALAKRISHNA KURUP
SRI.S.MANU

RESPONDENTS:

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1. K.P. BALACHANDRAN, S/O.KUTTAPPAN,
PULICHAMAKKAL HOUSE, S.N.PURAM P.O.,
KOTHALA KARA, KOOROPPADA VILLAGE.

2. KAMALAKSHI, W/O.KUTTAPPAN,
PULICHAMAKKAL HOUSE, S.N.PURAM P.O.,
KOTHALA KARA, KOOROPPADA VILLAGE.

BY

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 10/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**M.SASIDHARAN NAMBIAR,J.**

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**W.P.(C)NO.1064 OF 2007**

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**DATED THIS THE 10th DAY OF JANUARY, 2007**

**JUDGMENT**

Petitioners are defendants and respondents plaintiffs in O.S.80/06 on the file of Munsiff Court, Kottayam. Suit was filed seeking a decree for declaration of easement right and mandatory as well as prohibitory injunction in respect of plaint schedule item No.3. Petitioners filed I.A.3144/06, an application for an interlocutory order of mandatory injunction, directing petitioners herein to remove the obstruction caused to the pathway. Under Ext.P5 order, learned Munsiff directed petitioners to remove the barbed wire fence in the 3 feet width portion marked by Commissioner in Ext.C3(a) plan. Petitioners challenged that order before District Court, Kottayam in C.M.A.65/06. Learned District Judge after elaborate consideration of the contentions raised by both parties and the documents confirmed that order under Ext.P7 order. It is challenged in this petition filed under Article 227 of Constitution of India.

2. Learned Counsel appearing for petitioners was heard.

3. Arguments of learned Counsel appearing for petitioners was that as per the report submitted by Commissioner evenif a barbed

wire fence, as directed by the trial court and confirmed by learned District Judge is to be removed, plaintiffs cannot use the pathway as the pathway is not available on the remaining portion of the property and in such circumstances, the order of interlocutory mandatory injunction should not have been granted, as it would only cause damages and loss to petitioners and respondents will not gain anything by the order.

4. On hearing learned Counsel appearing for the petitioners, I do not find any infirmity or irregularity in Ext.P7 order warranting interference in exercise of the extraordinary jurisdiction of this Court under Article 227 of Constitution of India. The question whether plaintiffs have a right of easement over plaint item No.3 of plaint schedule pathway can only be decided by learned Munsiff on the evidence to be let in.

5. Learned Munsiff and Learned District Judge on the materials produced found that just before institution of the suit, a barbed wire fence was put up to cross the way. It was contended before the Courts below that plaintiffs have an alternate way through the property of Varghese Cherian. Commissioner reported that there is no such way available to plaintiffs as that way was obstructed by placing granite stone and other obstructions and it is not possible to use that way at all. Moreover there is no case that plaintiffs have a right of way through property of Varghese Cherian.

Added to this, a right of easement by prescription if exists,will not be lost by the existence of alternate way. Finding that plaintiffs have no other way to reach the property, learned Munsiff and learned District Judge directed removal of the obstruction as it was shown that obstruction was caused just before the institution of the suit. In such circumstances, no interference is warranted. The petition is dismissed.

Learned Munsiff is directed to dispose the suit, as expeditiously as possible untrammeled by any observation in Exts.P5 and P7 orders or in this judgment.

**M.SASIDHARAN NAMBIAR,JUDGE**

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